

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

LEE MAX BARNETT,
Petitioner,
vs.
ROBERT L. AYERS,
Respondent.

No. CIV S-99-2416-JAM-CMK
DEATH PENALTY CASE
ORDER

Petitioner, a state prisoner proceeding with appointed counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner's motion for leave to take the deposition of Jacek Gabryelski (Doc. 267). A hearing was held before the undersigned in this matter on October 22, 2008. Jennifer M. Corey and Robert D. Bacon appeared for petitioner; Tami Warwick appeared for respondent.

Upon consideration of the arguments presented in petitioner's request and respondent's opposition, and the discussion with the parties, the court will grant petitioner leave to take Mr. Gabryelski's deposition pursuant to Rule 6 of the Federal Rules Governing Section 2254 Cases. The decision to allow the deposition of this terminally ill witness is precautionary in nature. This order is made without prejudice to respondent's right to raise the issue of whether

1 petitioner has made a proper showing or demonstrated due diligence in the state court. These
2 issues will be resolved at a later time.

3 Accordingly, good cause appearing therefor, IT IS HEREBY ORDERED that:

4 1. Petitioner's motion for leave to depose witness Jacek Gabryelski (Docs.
5 261, 267) is granted;

6 2. Mr. Gabryelski's deposition is set for November 3, 2008, at 10:00 a.m.;

7 3. If, given Mr. Gabryelski's health, his deposition cannot occur on
8 November 3, 2008, it shall be reset as soon as possible, at a time mutually agreed to by the
9 parities; and

10 4. If the parties are not able to agree on a mutually acceptable time, they may
11 set the matter for a telephonic conference with the court.

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13 DATED: October 24, 2008

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15 CRAIG M. KELLISON
16 UNITED STATES MAGISTRATE JUDGE
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